Bargaining in the Shadow of Cameras: Videotaping Negotiations to Enforce Model Rules of Professional Conduct

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I. INTRODUCTION

A recent article on ethical negotiation begins with the somber observation that, in negotiations, attorneys lie.[1] They lie "about their goals, priorities, interests;...reservation point[s];...alternative[s]; ...[and] objective standards."[2] In short, they would lie about nearly anything "that [could] impact the perceived strength and weakness of their side."[3] If true, many attorneys routinely violate Model Rule of Professional Conduct (MRPC) Rule 4.1,[4] as drafted by the American Bar Association (ABA) and adopted in some variation by 49 states.[5] Rule 4.1 forbids attorneys from either affirmatively misrepresenting a fact or the law or omitting a material fact when disclosure is necessary to avoid assisting a client's fraudulent or criminal act.[6]

To characterize the majority of attorneys as licensed liars is hyperbole, but this particular hyperbole contains more than a grain of an (inconvenient) truth: Professors Hinshaw & Alberts's empirical study of attorneys' negotiation ethics concluded that an "unacceptably high number of attorneys indicate they would be willing to engage in a fraudulent...negotiation...if asked to do so by their client."[7] They found that 30% were willing to accede to a client's request that they withhold a material fact in direct contravention of Rule 4.1.[8] Worse yet, an even

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[1] James K.L. Lawrence, *Lying, Misrepresenting, Puffing and Bluffing: Legal, Ethical and Professional Standards for Negotiators and Mediation Advocates*, 29 OHIO ST. J. ON DISP. RESOL. 35, 36 (2014).

[2] *Id.*

[3] *Id.*

[4] Art Hinshaw & Jess K. Alberts, *Doing the Right Thing: An Empirical Study of Attorney Negotiation Ethics*, 16 HARV. NEGOT. L. REV. 95, 102 (2011).

[5] *See id.* at 101 (noting that all states except California have their own versions of Rule 4.1).

[6] MODEL RULES OF PROF'L CONDUCT r. 4.1 (2016). Rule 4.1(b) permits omissions if Rule 1.6, the MRPC's confidentiality provision, would prohibit disclosure of a client's confidences.

[7] Hinshaw & Alberts, *supra* note 4, at 163.

[8] *Id.* at 145.

higher proportion believed that Rule 4.1 violations are pervasive among attorneys who conduct negotiations.[9]

The ABA first adopted Rule 4.1 in 1983; it remains the only rule that explicitly addresses negotiation by attorneys.[10] Its sponsors first proposed a draft that would have obligated "attorney negotiators to be 'fair' and to correct another party's 'manifest misapprehension.'"[11] However, Professor James White warned that such a demanding rule would have been honored only in the breach and so succeeded in scaling it down to "the lowest level of legally acceptable conduct," whereby attorneys need only steer clear of fraud.[12] To many, then and now, this dilution betrays at worst a moral weakness in tolerating deception and, at best a superfluity in providing little more protection than that already found in the law of fraud.[13]

Indeed, Professor Eleanor Holmes Norton noted in 1989 that Rule 4.1, only a few years into its infancy, did not absolve the legal community of its glaring need to produce a workable aspirational ethic, one more robust than the minimum floor Rule 4.1 sets.[14] In the more than 25 years since Professor Norton's seminal article, there has been no shortage of proposals to strengthen the MRPC. Many of them exhort, in one form or another, total candor, a categorical prohibition on deception, or a general duty of good faith.[15]

Yet despite the chorus, Rule 4.1 has hardly budged.[16] The most recent high-profile movement tasked with amending the MRPC to

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[9] *Id.* at 120.

[10] *See* Robert C. Bordone, *Fitting the Ethics to the Forum: A Proposal for Process-Enabling Ethical Codes*, 21

OHIO ST. J. ON DISP. RESOL. 1, 20 (2005).

[11] Hinshaw & Alberts, *supra* note 4, at 162 (quoting James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 5 AM. B. FOUND. RES. J. 926, 937 (1980) (discussing which kinds of lying should be proscribed under the Model Rules)).

[12] *Id.* at 162 (citing JESS K. ALBERTS ET AL., HUMAN COMMUNICATION IN SOCIETY 25–31 (2007)).

[13] *Id.* at 107.

[14] Eleanor Holmes Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U. L. REV. 493, 501 (1989).

[15] *See* Peter Reilly, *Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help*, 24 OHIO ST. J. ON DISP. RESOL. 481, 520–22 (2009) (categorizing recent calls for reforming the MRPC).

[16] *See id.* at 519 (citing Van M. Pounds, *Promoting Truthfulness in Negotiation: A Mindful Approach*, 40

encourage, if not require, the steady exchange of accurate information conducive to integrative negotiation was the ABA's Ethics 2000 Commission. It pondered an overhaul of the MRPC with respect to negotiation, but it ultimately "adopted only a *de minimis* approach to deal with ethics...in dispute resolution."[17]

After the Ethics 2000 Commission came up short, Professor Robert Bordone argued for what he described as a "radical" reform that would establish a separate MRPC for Lawyers in Negotiation ("MRPCN") to accommodate negotiation's emergence as a method distinct from litigation. The MRPCN would be written in the spirit of private ethical codes for arbitration and mediation, themselves long recognized as discrete spheres alternative to, rather than subsumed by, traditional litigation.[18] To date, the ABA has not heeded Professor Bordone's recommendation.

Whatever the source, scale, or nature of various pushes for modifications of the MRPC, Professor Peter Reilly thinks all of them are unlikely to improve ethical standards because of inherent enforcement difficulties even if implemented.[19] In his view, aspirational standards as lofty as "good faith" or "fairness" pose eternally challenging interpretation problems, while rules as absolute as "no lying—ever" would essentially require mind-reading, since a party's true interests and priorities are often not only purely mental but also dynamic because they shift as a negotiation unfolds.[20] Notably, Professor Reilly includes Professor Bordone's solution as among those likely hampered by enforcement problems.[21]

In this article, I will not insist on what Professor Bordone calls a "cosmic" sense of "right" and "wrong" to which all lawyers would surely assent.[22] To do so, as Professor Bordone suggested, would only breed confusion.[23] Nor do I seek to add to the growing backlog of

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WILLAMETTE L. REV. 181, 197 (2004)).

[17] Bordone, *supra* note 10, at 37 (citing Carrie Menkel-Meadow, *The Lawyer as Consensus Builder: Ethics for a New Practice*, 70 TENN. L. REV. 63, 85 (2002)).

[18] *Id.* At 42.

[19] Reilly, *supra* note 15, at 523.

[20] *Id.* at 524.

[21] *Id.*

[22] Bordone, *supra* note 10, at 5.

[23] *Id.*

propositions that the ABA may find easy to embrace in theory but, at least as reflected in its historical treatment of Rule 4.1, hard to enact or implement in practice.

Instead, my aim is much more modest: I merely submit an easily observable and virtually painless addition to negotiations in order to make arguably amorphous concepts such as good faith and total disclosure more amenable to effective enforcement.

Quite simply, I posit that *videotaping* negotiations between attorneys will both induce more ethical behavior *ex ante* and facilitate enforcement *ex post*. The ABA should *mandate* that all negotiations above a certain dollar value be videotaped. These tapes would be subject to strict nondisclosure agreements (NDAs) binding the attorneys, conditional on substantial compliance with ethical rules requiring exchange of accurate information.

My article proceeds as follows. Part II explores why negotiators lie and reveals that they are trapped in a prisoners' dilemma wherein even those who recognize that truth-telling is value-maximizing might engage in deception to protect themselves from exploitation. Hence, previous proposals such as Professor Bordone's MRPCN may patch up other problems (the litigation-minded MRPC's unsuitability to negotiation) but do not do enough to solve this more fundamental one. Moreover, they overlook a crucial feature that contributes to more ethical behavior and better enforcement regimes in fields whose regulatory strategies Professor Bordone hopes negotiation will follow: the presence of a neutral third-party arbiter.

To address barriers to effective enforcement and to simulate this third-party observer, I introduce in Part III my proposal to videotape negotiations as a potential answer. I ground my proposal in psychological research that has consistently evinced a "social facilitation effect" whereby an observer's mere presence subtly influences those under observation to behave more cooperatively. I then use two negotiation cases carried out by Harvard Law School's (HLS) Spring 2016 Negotiation Workshop's enrollees to illustrate how an observing camera's presence or absence might have induced variations in disclosure. I explain how videotaping's social facilitation makes negotiators mindful of their reputations and so more cooperative *ex ante*. I end Part II by contrasting my proposal with Jamison Davies's recent suggestion to use derivative contracts and clearinghouses to

"formalize reputation markets" as Professors Robert Mnookin and Ronald Gilson once suggested.[24]

Part IV next demonstrates that videotaping negotiations can also bolster currently weak enforcement regimes by making available evidence usable in ethics proceedings, claims for contractual rescission, and even tort suits sounding in fraud. I analogize to the use of video evidence in another context—a recent judicial decision ordering police officers to wear body cameras—to support my proposal's potential to improve enforcement. However, I return to social psychology research to emphasize that videotaping's effects on *ex post* enforcement can only add to, but operates independently of and thus does not detract from, its *ex ante* nudging of negotiators toward integrative problem-solving.

In the final subsection of Part IV, I acknowledge that this single procedural rule is no panacea, but point out how this argument has failed to stall progress in the law's attempts to solve other social ills such as discrimination and securities fraud.

I turn at last to objections in Part V. First, the philosophical: videotaping seems inherently Orwellian, and unlike the unwitting in *1984*,[25] negotiators might actively resent cameras' watching them. However, in invoking Professor Lawrence Lessig's work on *social meaning*, I argue that a rule requiring videotaping need not be seen as implying that negotiators are untrustworthy, and hence, need not provoke resistance. I draw on cameras in airports and the seemingly mundane phenomenon of hockey players' wearing of helmets to show how the ABA can frame ethical rules so that negotiators writ large see them as Professor Bordone sees them—not as Orwellian constraints on individual behavior but as facilitators of cooperative environments.[26]

Then, the practical. Negotiators may see video cameras, if not as Orwellian surveillance, then at least as a burdensome inconvenience limiting their choice of settings or modes of communication, such as phones or email. To lighten the burden, I suggest adding the caveat of a

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[24] *See* Jamison Davies, Note, *Formalizing Legal Reputation Markets*, 16 HARV. NEGOT. L. REV. 367, 371 (2011). For an overview of legal reputation markets, see generally Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509 (1994).

[25] *See generally* GEORGE ORWELL, 1984 (1949).

[26] Bordone, *supra* note 10, at 9.

dollar value floor that exempts from the videotaping requirement negotiations wherein the "amount-in-controversy" falls below that floor.

Some may worry that the recordings might be disseminated to their detriment, but I remind them that existing Model Rules affirming each negotiator's own duty of confidentiality to her client already guard against unauthorized dissemination. Insofar as this does not completely calm their concerns, standardized NDAs allowing dissemination only to tribunals adjudicating meritorious claims of unethical behavior can do the rest.

Lastly, reformers may doubt whether the ABA will heed my suggestion. I maintain that my minimalist proposal does not ask the ABA to move mountains: it at least warrants the ABA's consideration as a measure to promote its own desire for more cooperation among attorneys in negotiations and to restore the public's trust in the profession.

Part VI concludes. There, I identify my proposal's wide applicability to ethical issues that are emerging in other domains of the law even as the lines separating those domains collapse.

Finally, I tie it back to Professor Norton's thesis that only a rule of the game that becomes integrated into the negotiating process itself can succeed in regulating that same process.

II. WHY DO NEGOTIATORS LIE?

To understand how videotaping negotiations would encourage parties to negotiate candidly, we must first understand why they might deceive under the status quo. As is, Rule 4.1 simply implores attorneys to refrain from outright lying and from omissions of material facts that would facilitate clients' fraudulent or criminal schemes—how can that be too much to ask? Remarkably, the reasons attorneys give to explain, defend, or justify an alleged Rule 4.1 violation are many.

First, many believe that they are economic actors of Milton Friedman's mold, free to use any tactic as they wish, in pursuit of any purpose, so long as they stay within "the rules of the game."[27] As

[27] Richard Shell, *Bargaining with the Devil Without Losing Your Soul: Ethics in Negotiation*, in WHAT'S FAIR: ETHICS FOR NEGOTIATORS 57-74 (Carrie Menkel-Meadow et al. eds., 2004). For an interpretation of Friedman's "rules of the game," see Thomas

lawyers, they believe that their singular mission is to advocate zealously for their client's wishes and demands. In a strict sense, this rationale is supported by the MRPC; Comment 1 to Rule 1.3 does instruct lawyers to "take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor."[28] And "[u]nder generally accepted conventions in negotiation" Rule 4.1 exempts "certain types of statements" from the definition of "material fact," thereby permitting their nondisclosure.[29]

Rule 4.1's sharpest critics contend that its greatest failing is that it explicitly countenances deception as to matters falling under "certain types of statements."[30] Comment 2 to Rule 4.1 asserts that statements regarding reservation prices, parties' willingness to settle, and undisclosed principals generally do not constitute "material facts" and hence do not offend Rule 4.1.[31] Although Rule 4.1 suggests that the three illustrations are not exhaustive, it fails to specify what "type" of statement qualifies for its exemption.[32] The seemingly unprincipled manner wherein Rule 4.1 enumerates those 3 items as examples without a rationale uniting them only invites individual negotiators to persuade themselves that just about anything warrants the same exemption.[33] It should be no surprise, then, that much confusion and disagreement ensue about what Rule 4.1 deems a "material fact" or a "misrepresentation."[34]

Furthermore, Rule 4.1(b) facially subordinates its already limited duty to disclose to Rule 1.6's general prohibition on disclosure of client confidences, which leads many well-intentioned attorneys to believe that attorney-client confidentiality overrides many duties to disclose without realizing that Rule 1.6(b)(3) already permits disclosures necessary "to prevent, mitigate, or rectify" substantial injuries flowing

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Coleman, *Corporate Social Responsibility: Friedman's View*, BECKER FRIEDMAN INSTITUTE FOR RESEARCH IN ECONOMICS (August 16, 2013), https://bfi.uchicago.edu/news/feature-story/corporate-social-responsibilty-friedmans-view.

[28] MODEL RULES OF PROF'L CONDUCT r. 1.3, cmt. 1 (2016).

[29] *Id.* at r. 4.1, cmt. 2.

[30] Hinshaw & Alberts, *supra* note 4, at 107.

[31] MODEL RULES OF PROF'L CONDUCT r. 4.1, cmt. 2 (2016).

[32] Norton, *supra* note 14, at 537.

[33] *Id.* at 538.

[34] Hinshaw & Alberts, *supra* note 4, at 122.

from the client's commission of crimes or fraud with assistance of counsel.[35]

Rule 4.1's arcane and muddled interactions with other Model Rules are bad enough in themselves. But they contribute most to nondisclosures and misrepresentations because they explicitly envision—and favor—an adversarial ethos whereby an attorney is a "zealous advocate" whose client's interests are paramount, which in turn purportedly justifies treating the attorney across the table not merely as a coparticipant in an *adversarial process* but also as an *adversary herself*.[36] Professor Mnookin rejects the zealous advocate justification for deceptive tricks and other hard bargaining tactics as "nonsense[, as] Rule 1.3 requires 'reasonable diligence' on behalf of a client," not blind loyalty.[37] But that combative frame of reference has continued to ignite competitive spirits between lawyers, which is to be expected because the ABA drafted the MRPC under the paradigm of litigation, which naturally led to the ossification of the adversarial ethic.[38]

Of course, this is why Professor Bordone proposed the MRPCN: the ABA designed the MRPC in a past era, for what is essentially a different game: Litigation.[39] Negotiation, as an art unto itself, rewards zealous advocates too, but zeal as adapted in-context "entails identifying the [client's] underlying interests...and employing...listening, creativity, and joint problem-solving to best meet those interests and attain a[n]...efficient outcome."[40] This much is not in dispute; academics and practitioners alike have reached this consensus. Indeed, this belief in negotiation's utility helps explain negotiation's rise in usage. As early

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[35] *Id.* at 156.

[36] *See* ROBERT MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 292–93 (2000).

[37] *Id.* at 293.

[38] *See* Brian C. Haussmann, *The ABA Ethical Guidelines for Settlement Negotiations: Exceeding the Limits of the Adversarial Ethic*, 89 CORNELL L. REV. 1218, 1241 (2004) ("ABA formulated its approach to regulating the disclosure of a client's material facts out of a concern...that the adversarial ethic be preserved") (citing AM. BAR ASS'N CTR. FOR PROF'L RESPONSIBILITY, *The Legislative History of the Model Rules of Professional Conduct: Their Development in the ABA House of Delegates* (1987)).

[39] *See* Bordone, *supra* note 10, at 4.

[40] *Id.* at 23.

as 1989, Professor Norton observed that "[i]n effect, litigation is the alternative to bargaining," not the other way around.[41]

Strikingly, though attorneys know full well that joint problem-solving attains the most efficient outcomes through Full, Open, and Truthful Exchange (FOTE),[42] still many justify Rule 4.1 violations (i.e., the exact opposite of FOTE) as a preemptive self-defense tactic against other attorneys whom they perceive as riddled with ethical violations.[43] In other words, "FOTE is in tension with the Negotiators Dilemma," wherein negotiators must "balance how 'full' and 'open' to be, given how" information can be exploited.[44]

Hence, even if an attorney can be persuaded that the MRPC, as the official "rules of the game," unequivocally forbids deception, their belief that other attorneys routinely flout the MRPC suggests that the game is actually played by a different, unspoken set of "rules" more customary of the Wild West. Put plainly, some attorneys "treat legal negotiations like prisoners' dilemma games: even if they know [deception] violates the [MRPC], they may behave unethically simply just to compete with other lawyers."[45] In this respect, Rule 4.1 produces effects similar to the MRPC's other provisions. Professor Fred Zacharias describes the more pervasive consequences of under-enforcement of the MRPC:

> The bar's apparent failure to enforce the rules suggests that noncompliance is appropriate, either because nonenforcement implies that the rules are unenforceable...or because it implies the rules mean something other than what they seem to say. Moreover, even if the lawyer accepts that it is wrong to violate the rules, she may believe that she needs [to violate them] in

[41] Norton, *supra* note 14, at 496.
[42] HOWARD RAIFFA, LECTURES ON NEGOTIATION ANALYSIS 11 (1996).
[43] Hinshaw & Alberts, *supra* note 4, at 108.
[44] Reilly, *supra* note 15, at 496.
[45] Hinshaw & Alberts, *supra* note 4, at 134.

> order to compete with lawyers who breach the code with impunity.[46]

Nor is this just any prisoners' dilemma. As Robert Axelrod demonstrated in the 1980s, if a small band of cooperators *capable of recognizing and remembering one another as cooperators* infiltrates a larger school of defectors stuck in a prisoners' dilemma, the cooperators will outperform the defectors, proliferate faster, and eventually redefine the landscape as largely cooperative instead of overwhelmingly selfish.[47] *But this can take generations.*[48] Hence, without external intervention, cooperative and ethical attorneys may languish as a persistent minority. In fact, in the twenty years between Larry Lempert's 1988 survey of attorneys' ethical viewpoints and Professor Reilly's 2008 redux, members of the legal community apparently have *diverged* even further apart in their judgments of what constitutes ethical and unethical behavior, even though Rule 4.1's language has remained largely the same.[49]

If even well-meaning attorneys cannot agree on what it means to be ethical, the slightest dose of cynicism may all but prevent attorneys attempting to cooperate from recognizing each other as such, thus perpetuating a collective action problem wherein the legal community—and clients—would benefit from large-scale cooperation, but no particular subset of attorneys save for Professor Gerard Wetlaufer's "saints and fools" would volunteer for the chopping block.[50] Consequently, lying in negotiation has proved seemingly intractable.[51]

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[46] Fred C. Zacharias, *What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971, 1005 (2002).

[47] *See* DOUGLAS HOFSTADTER, *The Prisoner's Dilemma: Computer Tournaments and the Evolution of Cooperation, in* METAMAGICAL THEMAS: QUESTIONING FOR THE ESSENCE OF MIND AND PATTERN 715–34 (1985).

[48] *See id.*

[49] Reilly, *supra* note 15, at 519.

[50] *See* Gerard Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219, 1233 (1990) ("Under conditions [where we assume the worst of our adversary], only saints and fools can be relied on to tell the truth.").

[51] Reilly, *supra* note 15, at 482.

What's more, the empirical evidence of the prevalence and persistence of lying negotiators—most of whom may sincerely believe in their own honesty—buttresses Professor Reilly's skepticism that rewriting the MRPC's language to require "total candor," even if as part of Professor Bordone's project of carving out the MRPCN afresh, may not suffice. If the MRPC's baseline expectations ("just don't defraud anyone") struggle to command uniform comprehension and obeisance, the story goes, one can hardly expect aspirational (e.g., "FOTE") regulations stricter in spirit but looser in interpretation to do much better.

Note that this in no way contradicts Professor Bordone's diagnosis that the MRPC is outmoded and ill-suited for modern interest-based negotiation. Yes, a process-specific MRPCN should supplant the MRPC, whose one size (litigation) quite clearly no longer fits all (most modes of ADR).[52] No doubt, the MRPCN should be geared toward "achiev[ing] an outcome that optimize[s] the parties' interests...based on fair norms and standards[;]...maintaining clear communication[;] and building trust."[53] But even Professor Mnookin recognized that Rule 4.1, while far from ideal, "is at least somewhat enforceable"; anything stricter would be "very difficult to enforce."[54]

Professor Bordone's MRPCN would mandate that negotiators undergo training in Mnookin's interest-based negotiation theory and skills.[55] But the attorneys Hinshaw & Alberts studied in 2011 were aware of, if not well-versed in, this mode of negotiation, as were the many attorneys that Professor Wetlaufer canvassed for his 1990 article.[56] The problem is less that a stubborn, shrinking contingent stays willfully ignorant of interest-based negotiation and more that even those *aware that their counterparts are likewise aware of interest-based negotiation's ascendancy* still hesitate to let their guard down, preferring instead to take their chances with Rule 4.1 because they fear

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[52] Bordone, *supra* note 10, at 22.

[53] *Id.* at 31.

[54] MNOOKIN ET AL., *supra* note 36, at 293–94.

[55] Bordone, *supra* note 10, at 31.

[56] *See* Wetlaufer, *supra* note 50, at 1236–37 (summarizing "the oral discourse of practicing lawyers").

their unrequited disclosures would leave them vulnerable in the Hobbesian anarchy Professor Zacharias described.[57]

Indeed, before we hold out hope that a stricter insistence on FOTE would transform the ethical landscape by instilling trust among formerly suspicious interest-based negotiators if only such an insistence can gain independence from MRPC's constrictions, a normative shift toward establishing trust among negotiators must first occur to assure them that they need not fear the *negotiators'* dilemma: if they decide to embrace FOTE, they would not be alone in exposing themselves to exploitation.[58]

Before turning to the merits of my proposal to videotape negotiations, it's worth pointing out Professor Bordone's own recognition that because "the MRPCN would require an extremely high degree of candidness, honesty, and information sharing..., monitoring and enforcement will be both more difficult and...more important in order to create a sufficient deterrent effect."[59] Nonetheless, Professor Bordone maintains that "enforcement is possible" by analogizing to prosecutors' duty to make available exculpatory evidence to the defendant and to federal securities laws' mandatory reporting obligations, both of which tout high compliance rates.[60]

Two characteristics may be responsible for both disclosure regimes' success, which, if lacking in negotiations, may dampen the analogies' support. First, consider the nature of the items that must be disclosed. In criminal law, exculpatory evidence is often tangible: witnesses' tales, forensic data, other suspects' existence, etc. So too with securities law: for example, the SEC requires companies to report "material events," such as a bankruptcy or a change in leadership, as they occur.[61] By contrast, Professor Reilly reminds us that clients' interests and priorities often reside solely within their and their lawyers' minds.[62] There will seldom be a "smoking gun" betraying a violation of disclosure requirements as blatant as a prosecutor who discards a forensic lab's

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[57] Zacharias, *supra* note 46, at 1005.

[58] *See* Valerie A. Sanchez, *Back to the Future of ADR: Negotiating Justice and Human Needs*, 18 OHIO. ST. J. ON DISP. RESOL. 669, 700 (2003).

[59] Bordone, *supra* note 10, at 40.

[60] *Id.*

[61] The SEC requires prompt disclosure of "current reports" on Form 8-K. 17 C.F.R. § 249.308.

[62] Reilly, *supra* note 15, at 524.

exculpatory findings or a company that buries its declaration of bankruptcy in a dusty basement file room.

Second, remember that a neutral third-party arbiter directly superintends *every* occasion on which a prosecutor confronts a decision to turn over exculpatory evidence or on which a company's management are suddenly replaced. In both cases, an impartial authority is, in a manner of speaking, "in the room" with, e.g., a company and its investors or a prosecutor and a defendant.[63] That overseer moderates temptations to deceive and can "turn less-than-truthful inputs into truthful outputs."[64]

Professor Bordone commends mediators and arbitrators for tailoring their own process-specific ethics to respect and reflect their disciplines' differences from traditional litigators.[65] The success of separate bodies of ethics, such as those promulgated by the American Academy of Family Mediators or the American Arbitration Association,[66] it would seem to follow, should inspire negotiators to follow suit with the MRPCN.[67] But observe that, as distinct from traditional litigation as mediation and arbitration might initially seem, they nonetheless share the crucial feature of a neutral third party presiding over proceedings. As much as negotiation's emphasis on joint problem-solving and orientation toward value-creating outcomes may justify its detachment from the litigation-centric MRPC, still they do not change the fact that negotiators operate almost exclusively in private, obscure not only from public view but also neutral supervision.[68]

Indeed, negotiation's private nature both defines its essence and confers its principal advantages over the more cumbersome traditional litigation model.[69] But it also complicates its amenability to real-time regulation and ex post enforcement. Put simply, "ethical problems...are

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[63] *See* Haussmann, *supra* note 38, at 1234 ("[An arbiter] makes it possible to entrust the parties with the presentation of issues, evidence, and arguments and with the challenges to them.") (citing Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 677 (1978)).

[64] *Id.* at 1230.

[65] Bordone, *supra* note 10, at 29.

[66] *Id.* at 2.

[67] *Id.*

[68] *See* Norton, *supra* note 14, at 498 ("a system of private bargaining of disputes...is not exposed to public scrutiny").

[69] *Id.* at 506.

easier to control [before] a judge than in...unmonitored private" settings.[70]

Thus, the two ways wherein disclosure in criminal and securities law differs from disclosures in negotiations—availability of verifiable evidence and the presence of a neutral arbiter—may attenuate the extent to they can serve as templates for an MRPCN to follow. At the same time, it is for precisely those two reasons that videotaping negotiations can bridge the dissimilarities and boost compliance.

III. MY PROPOSAL TO VIDEOTAPE NEGOTIATIONS

To begin with, because negotiation at its core is "a private, self-policed market process, there is no practical way to police ethical decisions from outside the process" itself.[71] Try as the MRPC and ethics committees tasked with its administration might, it can only be "invoked after the fact," which compounds difficulties of proving and punishing its transgressors.[72]

In particular, "enforcement of Rule 4.1 is virtually impossible without assistance from [the negotiating] attorneys" themselves.[73] Although another provision of the MRPC, Rule 8.3, obligates attorneys to report another attorney's MRPC violations to appropriate professional authorities,[74] it enlists far less assistance than would be necessary to give Rule 4.1 its full effect. For one thing, attorneys who actively participate in a negotiation have a hard time immediately detecting their counterparts' deception.[75] This is so even among "so-called 'experts' (such as police investigators),"[76] so it's not a matter of simply training attorneys to be more alert to cues such as gaze aversion or fidgetiness, for even these "telltale signs" can identify liars only slightly better than can chance.[77] And if nothing reliably betrays a

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[70] *Id.* at 528.

[71] *Id.* at 532.

[72] Wetlaufer, *supra* note 50, at 1235.

[73] Hinshaw & Alberts, *supra* note 4, at 161.

[74] MODEL RULES OF PROF. CONDUCT r. 8.3 (AM. BAR ASS'N. 2016).

[75] Reilly, *supra* note 15, at 531.

[76] *Id.*

[77] *Id.* at 525 (citing Jean R. Sternlight & Jennifer Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 437, 486–87 (2008)).

counterpart's bald-faced lies, perhaps one should focus on resolving Rule 4.1's own enforcement problems before expecting standards like "total candor" at once both more ambitious but even less visible.

A. *Videotaping*

To help resolve these enforcement problems, I propose videotaping negotiations. I harbor no delusion that deceptive negotiators' "tells" will suddenly become obvious where they would have previously escaped the naked eye in real-time. If the possibility of replay can aid a negotiator in learning a counterpart's habits so that she may discern inconsistencies in the next round of negotiations,[78] then that would just be a small ancillary benefit.

Rather, the presence of a video-recorder can serve as and replicate a neutral third-party monitor that currently presides over litigation, mediation, and arbitration but is lacking in negotiation. By filling that void, videotaping both encourages honesty during a negotiation itself and eases subsequent enforcement.

What is it about judges, mediators, and arbitrators that makes their very presence a check against deceit?[79] To be sure, some of it may stem from their elevated status: attorneys refer to judges with honorifics, and many arbitrators may be similarly esteemed. Insofar as this status accounts for their ability to keep the parties appearing before them honest, it would be farcical to intimate that negotiators owe the same reverence to an inanimate video-recorder.

Next, much of parties' greater candor before tribunals may lie in an entirely separate ethical rule: MRPC 3.3 is already aspirational in specifying that attorneys owe duties of candor and honesty to tribunals, which is a great deal more than Rule 4.1's baseline prohibition against fraud.[80] But Rule 3.3's higher expectations cannot be the end of the matter, for that would imply that "candor" and "honesty," as used in Rule 3.3, are somehow immune from the indeterminacy that hamstrings their portability into Rule 4.1-governed private negotiations.

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[78] *Id.* at 531–32.

[79] *See* Norton, *supra* note 14, at 497, n.14 ("[T]he effect of the entry of an authoritative monitor is almost surely to reduce opportunities for unethical behavior.").

[80] MODEL RULES OF PROF. CONDUCT r. 3.3 (AM. BAR ASS'N. 2016).

B. *"Social Facilitation"*

Rather, I posit that much of tribunals' "information-forcing"[81] influence stems from the "social facilitation" effect, a psychological phenomenon whereby "observer presence or mere social presence enhances the emission of dominant responses."[82] Dominant responses are those most commonly found or accepted in a community.[83] Professors Hinshaw & Alberts found that about 30% of attorneys they surveyed would behave unethically, which represented an "unacceptably high number."[84] Still, they represented a minority: most of the sample (62%) reported that they would refuse a client's request to withhold a material fact.[85] Even among those who chose the unethical option, many did so because they were confused as to whether the hypothetical client's true DONS (a fatal disease communicated through sexual intercourse) status qualified as a "material fact" or whether their Rule 1.6 duty of confidentiality overrode their Rule 4.1 disclosure duty,[86] *not* because they truly believed that misrepresentation is acceptable.[87] It is only because of the prevalence of negotiators' deception that I cannot simply assert honesty as the self-evident dominant response.

As such, it should be facilitated by the actual presence of an observer—or even of mere hints of observation. In a study tellingly titled "Cues of Being Watched Enhance Cooperation in a Real-World Setting," scholars compared participants' payments to an "honesty box" for milk and tea in a fridge.[88] In one scenario, an image of a pair of eyes

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[81] For an exploration of how legal rules may elicit information from private parties, see Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L.J. 1027, 1032 (1995).

[82] Yuki Miyazaki, *Influence of Being Videotaped on the Prevalence Effect During Visual Search*, 6 FRONTIERS PSYCHOL. 583 (2015).

[83] *See* Robert B. Zajonc & Stephen M. Sales, *Social Facilitation of Dominant and Subordinate Reponses*, 2 J. EXPERIMENTAL SOC. PSYCHOL. 160, 161 (1966).

[84] Hinshaw & Alberts, *supra* note 4, at 148.

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] Melissa Bateson et al., *Cues of Being Watched Enhance Cooperation in a Real World Setting*, *2* BIOLOGY LETTERS 412, 412–14 (2006); *e.g.*, Redouan Bshary & Nichola J. Raihani, *Toward an Experimental Exploration of the Complexity of Human Social*

overlooks the fridge. In another, a flower replaced the eyes. The fridge also featured a list of "suggested" prices. As social facilitation theory would have predicted, participants "paid nearly three times as much" of *their own money* in the eyes scenario than in the flower one.[89] The authors attribute this pattern to the eyes' inducement of a perception of being watched, which, they suggest, has practical implications "for those designing honesty-based systems."[90] Another study found that when its participants felt subject to surveillance cues, they "affirm[ed] their prevailing moral norms by expressing greater disapproval of moral transgressions" such as lying.[91] And subsequent studies have used the same contrast between images of flowers and eyes to replicate the findings of the study above, both cross-culturally[92] and as applied to real life littering and recycling.[93]

To make this point more vivid you may remember the billboard image of Dr. T. J. Eckleburg that overlooked Long Island in F. Scott Fitzgerald's 1925 novel *The Great Gatsby*.[94] In that novel, the billboard exclusively featured Dr. Eckleburg's eyes with spectacles. The characters pass by that billboard several times, each time barely noticing it despite its conspicuousness. When they did notice it, it would remind them of moral considerations that had previously eluded them.[95] This

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Interactions, 108.45 PROC. NAT'L ACAD. SCI. U.S. 18195, 18196 (2011) (Summarizing psychological studies, including Bateson et al.'s, indicating that "individuals are more helpful if they perceive cues that they are being watched.").

[89] Bateson et al., *supra* note 88, at 413.

[90] *Id.*

[91] P. Bourat et al., *Surveillance Cues Enhance Moral Condemnation*, 9(2) EVOL. PSYCHOL. 193–99 (May 5, 2011).

[92] *See, e.g.*, R. Oda et al., *An Eye-like Painting Enhances the Expectation of a Good Reputation*, 32 EVOL. HUM. BEHA. 166–71 (2011).

[93] *See* D. Francey & R. Bergmuller, *Images of Eyes Enhance Investments in a Real-Life Public Good*, 7(5) PLOS ONE (2012), http://www.ncbi.nlm.nih.gov/pubmed/22624026; *accord* Melissa Bateson et al., *Watching Eyes on Potential Litter Can Reduce Littering: Evidence from Two Field Experiments*, PEER J. (Dec. 1, 2015), http://www.ncbi.nlm.nih.gov/pubmed/26644979.

[94] F. SCOTT FITZGERALD, THE GREAT GATSBY 23 (1925) ("But above the grey land and the spasms of bleak dust which drift endlessly over it, you perceive, *after a moment*, the eyes of Doctor T. J. Eckleburg") (emphasis added).

[95] *Id.* at 167 ("'God knows what you've been doing, everything you've been doing. You may fool me but you can't fool God!'...Michaelis saw with a shock that [Wilson] was looking at the eyes of Doctor T. J. Eckleburg which had just emerged pale and enormous from the dissolving night. 'God sees everything,' repeated Wilson.").

may have been an early instance of what Professors Max Bazerman and Ann Tenbrunsel call "ethical fading," whereby decisionmakers tend to overvalue future, imagined outcomes to the exclusion of ethical factors.[96] Both the billboard of Dr. Eckleburg's eyes and the printout of nondescript eyes in psychological studies served to make viewers more cognizant of "the right thing to do."

And if a 2D printout of eyes can have this effect, then so too should a video-recorder. Indeed, "[v]ideo cameras have traditionally been used to manipulate observer presence," the effects of which video-monitoring mimics.[97]

C. *As Seen in the Spring 2016 Negotiation Workshop (Iqbal's Big Venture & DONS)*

That is the social psychology research. Negotiation has consequently come to incorporate descriptive empirical results into its pedagogy.[98] Take, as an illustrative example, HLS's Spring 2016 rendition of its Negotiation Workshop. During one week, its enrollees (of whom I was one) conducted a videotaped negotiation titled "Iqbal's Big Venture"[99] and later reviewed their recordings with faculty. Students' negotiations were taped for educational purposes. Presumably, no student entertained that his video could make unwanted appearances in ethics proceedings or tort suits alleging fraud. In any case, students were informed that their pairwise negotiations would be taped to allow them to observe the messages and cues each partner had intended to convey to, or in fact received from, the other;[100] whether

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[96] Max H. Bazerman & Ann E. Tenbrunsel, *Ethical Breakdowns*, HARV. BUS. REV. (April 2011), https://hbr.org/2011/04/ethical-breakdowns.

[97] Miyazaki, *supra* note 82.

[98] Bordone, *supra* note 10, at 16 (citing Valerie A. Sanchez, *Back to the Future of ADR: Negotiating Justice and Human Needs*, 18 OHIO ST. J. ON DISP. RESOL. 669, 693 (2003)).

[99] Robert C. Bordone & Tobias C. Berkman, "Iqbal's Big Venture" (May 2012), http://casestudies.law.harvard.edu/iqbals-big-venture/.

[100] NEGOTIATION WORKSHOP, HARVARD LAW SCHOOL, THE WORKBOOK 62 (Spring 2016) ("The video review enables you to observe yourself negotiating, to learn your partner's perspectives on and reactions to the negotiation, and to observe another pair of negotiators working on the same exercise.").

they had to negotiate ethically was not explicitly mentioned as part of the lesson plan.[101]

Nonetheless, many students, told in advance that their videos would be critiqued not only by their instructors but also by their peers, displayed an inclination to conduct "Iqbal's Big Venture" cooperatively. Of course, one can never eliminate as a potential motivator (nor, it seems, underestimate) the desire to "look good for the camera."[102] Whatever else that may imply, at the very least it meant that students wanted to be on their best behavior, which precludes "bluffing and puffing...and...the intentional use of deceptive hard-bargaining tactics."[103]

Instructors uploaded each pair's video to the course's website, where students can watch their own videos and their classmates'. For this piece, I returned to the course's website to watch the recordings of the 12 pairs of classmates who formed the subsection of the Spring 2016 Negotiation Workshop to which I belonged. Though I actively exercised the vigilance Professor Reilly recommends as a self-defense measure in order to spot indications of deception—such as unprepared, unconvincing, or defensive answers to probing inquiries [104] —I identified scarcely any instances of bad behavior or signs of bad motives.

Of course, this alone does not definitively prove much. As I mentioned above, even so-called experts of lie detection are overconfident "*but not more accurate*[] in their determinations of who is lying and who is not,"[105] and I am surely no expert. But you need not trust my account: after negotiating "Iqbal's Big Venture," my subsection drew and publicly displayed charts summarizing the options they ultimately decided on in reaching an agreement. The numerosity of the options the class collectively produced suggests that the students had engaged in "mutual information exchange, [which] enables parties

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[101] *See id.*

[102] *See* John R. Aiello & Kathryn J. Kolb, *Electronic Performance Monitoring and Social Context: Impact on Productivity and Stress*, 80 J. APPLIED PSYCHOL. 339–53 (June 1995).

[103] Bordone, *supra* note 10, at 31.

[104] Reilly, *supra* note 15, at 500 ("Because [the negotiator] was lying...she may not have prepared an answer for [an opponent's]...simply asking 'why?'...repeatedly and in different ways.").

[105] *Id.* at 531 (emphasis added).

to identify value-creating trades, areas in which they can exploit differences between them to enlarge the size of the overall pie."[106] Indeed, the subsection's variety of a dozen or so agreements' was probably limited only by time and imagination, not by deception or refusals to cooperate.

Interestingly enough, the Spring 2016 run of the Negotiation Workshop videotaped only "Iqbal's Big Venture," which did not explicitly implicate the ethics of disclosure, but did *not* videotape "The DONS Negotiation," the sole negotiation specifically designed to expose students to ethical challenges concerning disclosure. While debriefing "The DONS Negotiation," the most noteworthy variations that emerged consisted in negotiators' decisions to disclose (or not) and their rationales for their decisions.

Coincidentally, Hinshaw and Alberts's study adapted the very same "DONS Negotiation" to measure attorneys' ethical tendencies and their attitudes on disclosure.[107] Briefly, "The DONS Negotiation places the attorney in the moments before settlement negotiations[, when] the client reveals a critical new fact[:]...his two earlier DONS tests [were] false positives[, so] he does not have the [DONS] disease after all."[108] Nevertheless, the client requests that his attorney withhold this new fact in order to punish his former girlfriend,[109] whom he had led to believe that his two previous positive DONS tests accurately indicated that he was afflicted with the disease.[110]

In this scenario, Rule 4.1 would deem "the client's actual DONS status...*clearly* material...because the entire settlement negotiation is premised on the client's statement that he had contracted the DONS virus."[111] And yet, of the attorneys surveyed, "only one-half...properly applied Rule 4.1,"[112] a proportion that Hinshaw and Alberts found "alarming" and "worrisome."[113]

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[106] Bordone, *supra* note 10, at 18.
[107] *See* Hinshaw & Alberts, *supra* note 4, at 116.
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.* at 122 (emphasis added).
[112] *Id.* at 120.
[113] *Id.*

One hopes—but I expect—that students and attorneys would have hewn closer to Rule 4.1's spirit under videotaped conditions, much as "Iqbal's Big Venture" had been.

A cautionary warning: of course, my comparison of "Iqbal's Big Venture" and "DONS" in this section has been far from scientific. For one thing, they are two distinct negotiation cases, which means that I cannot treat one as if it were the other's control group because the variable to manipulate here, while holding all else constant, is *not* what case students enacted, but whether they were 1) videotaped or 2) not videotaped.

The most I can say at present is that the contrasting observations I gathered from the two cases, separate as they are, is at least consistent with what social facilitation theory would predict: that an observer (or a video-camera) would encourage cooperation and discourage deceptive practices (e.g., material omissions).

In the future, it would be interesting to sort a future cohort of Negotiation Workshop enrollees into either an experimental group or a control group, have both groups enact the *same* case (e.g., assign both groups "DONS" only), and videotape the experimental group, but not the control group. That would provide sturdier empirical support to supplement my non-experimental examination of my Spring 2016 Negotiation Workshop classmates, which largely coheres with Professors Hinshaw and Alberts's survey of practitioners.[114]

D. *Social Facilitation Operates on Reputation*

Still, a video recorder cannot make corporeal what is purely mental: interests and priorities.[115] But as the 2D eyeball printout study

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[114] Note, however, ethical attitudes and practices may differ between students as one group and practitioners as another. For example, a survey of first-year students at Georgetown University Law Center, none of whom had taken a course on professional ethics, found that first-year students were *more willing* than practitioners to risk unethical behavior in pursuit of zealous advocacy. *See* Andrew Hogan, *The Naïve Negotiator: An Empirical Study of First-Year Law School Students' Truth-telling Ethics*, 26 GEO. J. LEGAL ETHICS 725, 739 (2013). The study's author hypothesized that students' greater willingness might be attributable to practitioners' having benefited from courses on professional ethics, or to practitioners' "better understand[ing] the *reputational* risk of unethical behavior." *Id.* (emphasis added).

[115] Reilly, *supra* note 15, at 524.

demonstrated, social facilitation does not require that uncooperative actions be directly observable—*only that the actor think he is being observed.* If a participant in that study had taken tea and milk from the fridge without paying into the honesty box, no one could have traced that grand larceny back to him. There were no cameras, no humans around, no payer-specific markers on the currency deposited into the honesty box. Yet the gentle sensation that *someone* is "in the room" with the participants effectively tripled their payments.

Likewise, videotaping negotiations can socially facilitate cooperative behavior, including honest disclosure and joint problem-solving. The means whereby it accomplishes this is no mystery: signals of monitoring raise reputational concerns and "the possible threat of punishment,"[116] the combination of which "leads to the preference of socially desirable cooperative strategies."[117] Few signals are less subtle than a video recorder.

Viewed another way, a video camera would make a negotiator's reputation—and fear of punishment, whether in the form of bruised reputations or otherwise, which I will address in Part IV—more salient in anticipation of, during, and upon reflection on his taped negotiations. And of course, the possibility that one's negotiating counterpart may replay the tape or, worse yet, admit it into evidence in an enforcement proceeding would make any negotiator contemplating deception think twice. Therefore, a video recorder can make negotiators behave *as if* their reputations are on the line in Professors' Mnookin and Gilson's reputation market in *each* taped negotiation.[118] In game theory's parlance, simply videotaping negotiations can bring the shadow of the future to the forefront of negotiators' consciousness.[119] Memorializing negotiators' cooperation and the accompanying integrative reputations thereby engendered should drastically hasten cooperative negotiators' banding together, their runaway propagation among negotiators, and the community's wholesale transformation from a deadlocked prisoners'

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[116] Jan Kratky et al., *It Depends on Who is Watching You: 3-D Agent Cues Increase Fairness*, PLOS ONE, Feb. 9, 2016, at 1, http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4747577/ (citing Max Ernest-Jones et al., *Effects of Eye Images on Everyday Cooperative Behavior: A Field Experiment*, 32 J. EVOLUTION & HUM. BEHAV. 172, 172–78 (2011).

[117] *Id.*

[118] Gilson & Mnookin, *supra* note 24, at 514.

[119] *See* ROBERT AXELROD, THE EVOLUTION OF COOPERATION 126–30 (1984).

dilemma into an environment more conducive to value-creating and problem-solving solutions.[120]

E. *Comparison to Jamison Davies' Formalizing Reputation Markets*

Admittedly, merely placing a video recorder in the negotiation room may lack Jamison Davies's ingenuity of formalizing Mnookin and Gilson's theoretical reputation market through derivative contracts or a centralized ratings clearinghouse. [121] But videotaping negotiations offers several advantages to Mr. Davies's two innovations.

First, videotaping's effectiveness in encouraging cooperative behavior lies primarily in its *simplicity*. As Mr. Davies shrewdly observes, "[d]erivative contracts may present some difficulties...[because] lawyers must structure [them]...to overcome countervailing incentives to behave in a non-cooperative fashion."[122] How might a lawyer do this? Mr. Davies's two suggestions are for "a neutral party [to] publish a list of all the [derivative] contracts and their statuses" and for lawyers to "open the derivatives to a secondary market." [123] Note, however, that both solutions presuppose that a functioning, well-drafted derivative contract already exists; they do not address how to draft these derivative contracts in the first place to "override incentives to behave in a non-cooperative fashion."[124] Unless negotiating attorneys can devise standard-form contracts based on (i.e., *deriving from*) attorneys' reputations, determining what shape such contracts should take and what contents they should hold may prove to be a costly endeavor only specialists can undertake, beyond the expertise of the negotiating attorneys themselves. Even if such derivative contracts successfully come into being, their enforceability still hinges on several "attendant risks and downsides."[125] When the task at hand is to enforce Rule 4.1, the solution should not spawn its own questions of enforceability.

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[120] *See id.*
[121] Davies, *supra* note 24, at 379.
[122] *Id.* at 376.
[123] *Id.* at 376–77.
[124] *Id.* at 376.
[125] *Id.* at 377.

In contrast, a video camera is, in the first instance, easy to just plug-and-play: no derivative experts required. Better yet, the recording it would produce is self-enforcing—it would quite literally speak for itself if entered as evidence in an enforcement proceeding.

Second, Mr. Davies foresees that a clearinghouse's "initial implementation would be [a] major obstacle." [126] It would be "dependent on a large number of users providing a large amount of feedback," which would demand time and effort that "[l]aw firms and clients might be reluctant to spend." [127] And, as with all things, "someone has to pay for" it.[128] Here too, a video camera's plug-and-play nature minimize implementation costs by supplying its own information, the very information Davies and Professors Gilson and Mnookin rightly consider so invaluable.

In sum, Mr. Davies's creative proposals suggest an impressive familiarity with the Dodd-Frank Act (DFA) (or its impetus and consequences if not the legislation itself), which called for greater regulation of and transparency in derivatives and for a central clearinghouse.[129] To be sure, I do not suggest that Mr. Davies modeled his methods of formalizing legal reputation markets on the DFA. But shying away from the DFA model of regulation is *precisely my point*: its formidable (if praiseworthy) attempt to regulate complex and risky financial technologies has predictably resulted in confusion and delay surrounding its implementation.[130]

Endeavors to make attorneys more attuned to the effects that their ethical decisions can have on their reputations as either wellsprings or Scrooges of accurate information does not need solutions that introduce their own complications. Instead, keeping it simple with my suggestion of videotaping may suffice to keep attorneys honest with each other.

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[126] *Id.* at 381.

[127] *Id.*

[128] *Id.*

[129] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[130] *See, e.g.*, John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882, 912 (2015) ("[T]hese decisions have clouded implementation of the Dodd-Frank Act, contributing significantly to the rulemaking delays under that law.").

IV. VIDEOTAPING'S EFFECTS ON ENFORCEMENT

Now, I could not promise that this one move will be the silver bullet that completely does away with all deception. Indeed, as with many challenges in negotiation, they cannot be eliminated—only managed.[131] Even with an ABA rule mandating that negotiations be videotaped, "[a] comfortable and well prepared liar"[132] can still figure out how to coexist with the camera in the room, especially since many deceptive acts are imperceptible.[133] But such a rule should do much to reduce incentives, temptations, and opportunities to lie during negotiations.

Insofar as such *ex ante* reductions can only be inevitably incomplete, the need for a robust enforcement regime remains. Unfortunately, punishing deception in negotiations "is and always has been a major challenge."[134]

The central obstacle, Professor Norton reminds us, is that negotiation, as a "private [and] self-policed market process,"[135] proves impervious to most regulation from outside that process.[136] In light of this obstacle, videotaping negotiations can emerge as a prime candidate to regulate from *within the process*. Quite literally, it would become part of the negotiating process itself: installing and turning on the video camera is Step One in that process.

But videotaping does more than merely fit—and thereby surmount—Professor Norton's description of the form any successful regulation must take. Indeed, just as a video camera can caution negotiators to behave cooperatively as the 2D image of watchful eyes had done, its recordings can serve evidentiary purposes by facilitating *post hoc* claims of a negotiator's deceit. In so doing, the camera would help break negotiators out of the prisoners' dilemma—that they wouldn't be a "fool" to exchange information fully, openly, and truthfully.

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[131] *Cf.* Robert Adler et al., *Emotions in Negotiation: How to Manage Fear and Anger*, 14 NEGOT. J. 161, 177–79 (1998) (advising that, in dealing with their emotions, negotiators can become more self-aware and exercise more self-control, but cannot eliminate them completely).

[132] Reilly, *supra* note 15, at 500.

[133] *Id.*

[134] Bordone, *supra* note 10, at 39.

[135] Norton, *supra* note 14, 532.

[136] *Id.*

Some misrepresentations go unpunished because their victims do not detect them. Others because, though detected, their victims forgo seeking relief because they anticipate problems of proof. The alleged liar might raise any number of familiar defenses and excuses: "what lie?"; "it never happened"; "you misunderstood"; "you're taking it out of context," and so on.

These defenses lose much of their force if existing video evidence contradicts or belies them. Take the "you're taking it out of context" defense. True enough, context is vital to determining a statement's intent and import. Statements in written transcript form (e.g., depositions) are bereft of cues no scribe can capture: meaning varies (or, at least, can be argued to be at variance with one's opponent's "misinterpretation") with things like intonation, emphasis, accompanying body language (imagine a wink), and much more.

Video evidence can restore those cues. Even if a video does not definitively establish one meaning as better than another, it would still allow a factfinder to determine for herself what the video shows instead of relying on disputants' dueling recollections, characterizations, or reenactments. If part of the explanation for honesty in mediation, arbitration, and litigation lies in a neutral arbiter's presence (if not an *arbitrator*'s) and her concomitant power to assess the parties *in real time*, then videotaping negotiations can enable a subsequent neutral arbiter to assess negotiators' behavior *as if* she had been present with them in real-time.

A. *Analogy to NYPD Body Cameras*

Video evidence's utility is nothing new in some of the law's other domains. Consider recent calls for law enforcement officials to wear "body cameras" to enable subsequent arbiters—whether a judge, a civilian complaint board, or an internal affairs bureau—to decide for themselves what their eyes tell them.[137] In *Floyd v. City of New York*, to mention just one prominent case, Judge Shira Scheindlin ordered the New York Police Department (NYPD) "to institute a pilot project in which body-worn cameras will be worn for a one-year period by officers

[137] *See generally* Mary D. Fan, *Privacy, Public Disclosure, Police Body Cameras: Policy Splits*, 68 ALA. L. REV. 395, 395 (2016).

on patrol in one precinct per borough."[138] In justifying her order, Judge Scheindlin claimed that "[v]ideo recordings will serve a variety of useful functions." [139] Most directly, "they will provide a contemporaneous, objective record of stops and frisks, allowing for the review of officer conduct by supervisors and the courts."[140] Video recordings would thus represent a vast improvement over the sole contemporaneous records previously submitted as evidence: written police forms and "short memo book entries," which were sometimes prepared only after significant delay and hence not truly "contemporaneous," and were often—if not "inherently"—one-sided.[141]

The same benefits would flow from porting video recordings and evidence into the negotiation context. If adopted, my proposal would ease problems of proof—ranging from inherent bias to sheer unavailability—in enforcing rules against misrepresentation, deceit, and fraud in negotiations. Moreover, bar associations' ethics committees are not the only arbiters, nor ethics proceedings the only avenue of relief, that this new availability of evidence would help. Judges and juries would be better equipped to evaluate aggrieved parties' requests for contractual rescission for misrepresentation as authorized by the Restatement (Second) of Contracts §164,[142] or even for remedies from a professional attorney's tortious misrepresentation to a third party under the Restatement (Second) of Torts §552, which some courts have used to allow non-clients (e.g., the aggrieved party from the other side of the negotiating table) to recover from lawyers.[143]

Easing misrepresentations of victims' access to judicial safeguards and remedies will in turn discourage negotiators from making such

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[138] Floyd v. City of New York, 959 F. Supp. 2d 668, 685 (S.D.N.Y. 2013).

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *See, e.g.*, Atl. Purchasers, Inc. v. Aircraft Sales, Inc., 705 F.2d 712, 718 (4th Cir. 1983) (awarding relief from a contract that violated a state's Unfair Trade Practice Act, which the court described as overlapping with §164).

[143] *See, e.g.*, McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 791 (Tex. 1999) (holding a lender's law firm liable for misrepresentations made to borrowers); *see generally* E. Cliff Martin & T. Karena Dees, *The Truth About Truthfulness: The Proposed Commentary to Rule 4.1 of the Model Rules of Professional Conduct*, 15 GEO. J. LEGAL ETHICS 777, 777–90 (2002).

misrepresentations in the first place, creating a positive feedback loop that will further apply downward pressure on the incidence of negotiators' deceit. This too has long been recognized and relied upon in other legal domains: Judge Scheindlin predicted that her order requiring the NYPD to wear body cameras "will encourage lawful and respectful interactions on the part of both parties."[144] Ultimately, Judge Scheindlin hopes that body cameras will "alleviate some of the mistrust that has developed between the police and...[the] communities" they serve.[145] Videotaping negotiations should likewise alleviate—or, better yet, forestall—mistrust of one's negotiating counterparty, and vice versa.

B. *Social Facilitation Exerts Two Related But Independent Effects: Ex Ante & Ex Post*

It is important to note, however, that video recordings' potential to reduce negotiators' uncooperative behavior ex ante can be supplemented by, but is independent of, the promise of effective ex post enforcement. That is, the very presence of a video recorder has a "truth-forcing" effect, even if the recording is never later presented to a tribunal for evaluation in contemplation of possible punishment. Recall that that image could not have served any evidentiary purpose: it could neither record anything nor report to any enforcers. Despite the 2D image's total inability (unlike, e.g., a video camera that was merely ambiguous as to whether it was turned on and functional), it still brought the best out of—or socially facilitated—participants. More broadly speaking, while early psychology researchers had thought that only observers who can evaluate performance can raise it,[146] a meta-analysis of more than 200 studies concluded that "social facilitation effects are surprisingly unrelated to the performer's evaluation apprehension."[147]

Put differently, the social facilitation effect represents a phenomenon that adds to, but does not depend on, the more obvious intuition that punishing proscribed behavior will deter it. To the extent that strict, publicized enforcement of the kind Professor Bordone espouses can enter a

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[144] *Floyd*, 959 F. Supp. 2d at 685.

[145] *Id.*

[146] N. Cottrell, *"Social Facilitation," in* C. McClintock (ed.), EXPERIMENTAL SOCIAL PSYCHOLOGY (New York: Holt, 1972).

[147] *See* Charles F. Bond, Jr. & Linda J. Titus, *Social Facilitation: A Meta-Analysis of 241 Studies*, 94 AM. PSYCHOL. BULL. 265, 265 (1983).

negotiator's calculus at his moments of temptation,[148] this is all for the better. Indeed, just as replaying videotapes can help a negotiator learn a counterparty's tells, that counterparty's greater awareness of the possibility of replay can counteract ethical fading.[149]

But even a negotiator who does not anticipate that a neutral arbiter will later view his videotaped session to assess the validity of an allegation of deceit will still be nudged toward more cooperative behavior by the mere presence of the video camera as an observer.

Consequently, this decoupling of a video camera's *ex ante* subtle influence from its later use in *ex post* ethical or judicial proceedings allows my proposal to withstand claims of imperfection: it cannot fully eliminate enforcement regimes' shortcomings rooted in the invisibility of negotiators' purely internal thoughts (e.g., interests, priorities, etc.). But this criticism pervades proof of mental states in wide swaths of the law: for example, even if a real estate transaction wherein a homeowner politely (or even rudely) turns away a buyer were caught on camera, it would still hardly show that the homeowner *intentionally* discriminated against the buyer because membership in a protected class as a legal concept or the homeowner's prejudice as a matter of fact. It's no secret that "[i]ntentional discrimination is so difficult to prove...because the evidence that exists [is] chiefly circumstantial in nature...."[150] Simply put, society finds it hard to envision, and courts remain reluctant to be convinced, that intentional discrimination exists "[a]bsent the smoking gun."[151]

C. *This Won't Solve Everything...But It's Still a Worthwhile Proposal*

But this longstanding difficulty of proof is no reason to abstain from adopting evidentiary modifications that, far from pretending that no such difficulty exists, attempt to make it easier to arrive at a regulatory scheme's desired end. In housing discrimination law, for example, courts have crafted, and Congress has accepted, disparate impact as an alternative theory perceived as "easier for plaintiffs to satisfy."[152] Because "a 'smoking gun'

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[148] *See* Bordone, *supra* note 10, at 31.

[149] Bazerman & Tenbrusel, *supra* note 96.

[150] Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 768 (2006).

[151] *Id.*

[152] *Id.* at 769; *see also* Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 2519 (2015) (confirming that the Fair Housing Act (FHA) includes disparate impact liability, characterizing Congress as having ratified its inclusion, and analogizing to the Court's endorsement of disparate impact liability in employment

often is not available to prove...discriminatory intent[,]...the Supreme Court in *McDonnell Douglas Corp. v. Green* set forth a three-step burden-shifting evidentiary model by which plaintiffs can prove cases through circumstantial evidence."[153] Even in securities law, which Professor Bordone cited as a field whose regulations enjoy high compliance,[154] class action suits alleging securities fraud confronted a seemingly insurmountable obstacle to class certification until the Supreme Court incorporated academic research in *Basic v. Levinson* to find "a practical resolution to the problem of showing individual reliance."[155] In all cases, the Court addressed vexing difficulties of proof by inventing or modifying procedural rules to increase a preexisting enforcement regime's effectiveness (e.g., Title VII's).

Have such innovations decisively removed all barriers to enforcement or completely eliminated the underlying ills? No. Much remains to be done to address housing and employment discrimination, securities fraud, and other stubborn wrongs.[156] The tools discussed above, and others like them, have greatly contributed to the progress made thus far,[157] even as the legal community has continued to debate their efficacy and potential flaws.[158] But the point is that an inability to prove, at the moment of proposal, that a proposed procedural innovation will cure all diseases in one fell swoop cannot justify discarding it before it even gets a chance.

The same holds true of my proposal to videotape negotiations. Early on, I disclaimed any pretension that I've stumbled upon the single move that will solve the pervasive, intractable problem of deception in negotiations. Instead, I called it a modest suggestion whose benefits may become apparent only incrementally, by way of a positive feedback loop between the twin effects of

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law in *Griggs v. Duke Power Co.* and Congress's subsequent codification) (internal citations omitted).

[153] Angela K. Herring, *Untangling the Twombly-McDonnell Knot: The Substantive Impact of Procedural Rules in Title VII Cases*, 86 N.Y.U. L. REV. 1083, 1088 (2011).

[154] Bordone, *supra* note 10, at 40.

[155] Jonathan R. Macey & Geoffrey P. Miller, *Good Finance, Bad Economics: An Analysis of the Fraud-on-the-Market Theory*, 42 STAN. L. REV. 1059, 1067 (1990) (citing Basic v. Levinson, 485 U.S. 224 (1988)).

[156] *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. *1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring in part and concurring in judgment) ("Today we enjoy a society that is remarkable in its openness and opportunity. Yet our tradition is to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain.").

[157] *See, e.g.*, *Inclusive Communities Project*, 135 S. Ct. at 2525 (acknowledging the need, and the FHA's "continuing role[,] in moving the Nation toward a more integrated society.").

[158] *See, e.g.*, Macey & Miller, *supra* note 155 (questioning *Basic*'s economic soundness).

ex ante social facilitation and *ex post* strengthened enforcement.

V. OBJECTIONS

A. *Philosophical*

My calling it "modest" does not mean, of course, that negotiators under a camera's gaze will agree. Indeed, I argued that a video camera can socially facilitate cooperative negotiation based on the simple premise that "if a 2D image of eyes can do it, so can a video camera."

1. *Reactance Theory*

But just as this lack of subtlety can support extending the social facilitation effect from social psychology to best practices in negotiation, negotiators can also perceive its "in-your-face-ness" as disquietingly Orwellian. If negotiators see videotaping as *surveillance*, then they may try to thwart it as predicted by either "reactance theory," or, more fittingly, what Professor Lessig calls the "Orwell effect."[159]

Before addressing this objection, I should underscore just how serious it is. I may have categorized it as "philosophical" for a neat heading, but it is probably better characterized as an objection "as a matter of principle," as it draws on sociological and psychological phenomena, much as Professor Lessig's article *The Regulation of Social Meaning* did in coining the "Orwell effect."[160]

Reactance theory has observed that "surveillance may undermine...the very behaviors...monitoring is intended to ensure." [161] How? Because reactance theory also holds that people (understandably) dislike measures perceived to restrict their freedom and will resist such measures in order to reassert their freedom.[162] To take an example all too familiar, Professor Cass Sunstein discussed teenagers who frustrate governmental programs that aim to reduce smoking and substance abuse, by smoking and abusing substances.

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[159] Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1017 (1995).

[160] *See id.* As far as I know, that article was the first to speak of an "Orwell effect," at least as it relates to legal attempts to influence actions' social meaning. Professor Lessig did not cite another source for that phrase.

[161] LEIGH THOMPSON, THE MIND AND HEART OF THE NEGOTIATOR 128 (2012) (citing Michael. E. Enzle and Sharon. C. Anderson, *Surveillant Intentions and Intrinsic Motivation*, 64 J. PERSONALITY & SOC. PSYCHOL. 257–66 (1993)).

[162] *Id.*

The government's well-intentioned condemnation somehow perversely glamorizes a teenager who dares to perform such acts of rebellion by appearing cool to his peers, a tiny subcommunity wherein conformity means defying "the government's" (scientifically correct) campaigns.[163]

Nor are such acts of rebellion limited to juvenile teenagers. Professor Elizabeth Joh observes that while the "police tend to think that those who evade surveillance are criminals, [such] evasion may only be a protest against the surveillance itself."[164] For instance, they may use online encryption or disposable phones not to conceal any criminal acts but to express their "ideological belief or personal conviction" against police surveillance.[165] Thus, citizens who engage in what Professor Joh terms "privacy protests" seek to convey expressions of distrust and disapprobation to their government, which they perceive as overreaching.[166]

What's more, even in the police context, resistance to surveillance can run in the other direction: frustration may brew among the *police officers themselves* if they suddenly become subject to surveillance too. Recall Judge Scheindlin's decision in *Floyd*. There, she issued her order decreeing that officers wear body-cameras *because* mutual distrust had developed between officers on the one hand and the communities they serve on the other.[167] It can be no surprise, then, when police departments embrace policies requiring them to wear body cameras only begrudgingly.[168] One need not sympathize with the Department as an institution to give an individual officer the benefit of the doubt that her abhorrence of such an imposition does not arise from a desire for impunity. Nor need one blindly trust this individual officer to surmise that she would interpret Judge Scheindlin's order as carrying a distinctively critical *social meaning*: that she, who might sincerely think of herself as a brand apart from the bad apples, nonetheless does not deserve trust. Judge Scheindlin's explicit citation of the restoration of trust as a justification for her decree only

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[163] *See* Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 906–18 (1996) (listing smoking's many harms and describing how teenagers "who reject generally held norms may be the most committed of conformists; they are following the norms of a subcommunity, [which] violates generally held norms but imposes a rigid orthodoxy on the subgroup").

[164] Elizabeth E. Joh, *Privacy Protests: Surveillance Evasion and Fourth Amendment Suspicion*, 55 ARIZ. L. REV. 997, 998 (2013).

[165] *Id.* at 1000.

[166] *Id.* at 1006.

[167] *See Floyd*, 959 F. Supp. 2d at 685.

[168] *See* J. David Goodman, *New York Police Should Revise Body Camera Rules, Report Says*, N.Y. Times, July 30, 2015 ("Cameras should not become another vehicle to make the job of policing any more difficult.").

confirms this.[169] Despite times when the monitor offers good reasons for why monitoring is necessary, it is plain how the particular reasons given can breed resentment in the monitored.

Thus, my proposal must respond to reactance theory's proposition that those under surveillance will resist and attempt to thwart video cameras from fulfilling their purpose. The more pushback attorneys give, the less utility video cameras provide.[170] Hence, I should allay their concerns about overreaching surveillance in order for my proposal to function as a net positive. It would be self-defeating if, *as a form of protest*, attorneys were to become even more tight lipped, not deceiving but not freely exchanging information either.

That point of emphasis is crucial. Note precisely what reactance theory holds. It does *not* hold that attorneys under surveillance would become more silent out of a fear of running afoul of Rule 4.1 on camera. That would simply indicate that the camera *over-deters* deception by chilling legitimate disclosures too. Obviously, that would not be ideal for attorneys or clients seeking negotiated solutions based on FOTE. But whether implementing a camera would overcorrect is an *empirical* matter, to be resolved if and when it arises. Here, it suffices to observe that over-deterrence and chilling effects are *not* reactance theory problems.

Rather, for reactance theory to present a true objection, an attorney must *actively rebel*. That is, not only does his conduct happen to violate a rule, but he intentionally does so *because* there's a rule proscribing it.

First, consider what that rebellion might look like. You might be imagining an attorney who would intentionally engage in uncooperative behavior. He might misrepresent a material fact. Sideline for the moment that doing so would expose him to ethical sanctions and other penalties discussed above. Here, simply note that *that* act of protest would be protesting Rule 4.1's substantive prohibitions on deceptions themselves, and *not* my rule mandating cameras, which is merely procedural.

Consider the following parallel to Professor Joh's account of privacy protests. Her conception of a privacy protestor is someone who tries to thwart police surveillance by, e.g., buying a burner phone, but would not have

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[169] *See Floyd*, 959 F. Supp. 2d at 685.

[170] *Cf.* Shari S. Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857, 1865 (2001) ("A motivation-based explanation, based on reactance theory, is that jurors see the admonition as an attempt to restrict their freedom to weigh and evaluate probative evidence in reaching their verdict. Responding to this threat to their freedom, jurors may not only be motivated to ignore the instruction to disregard the inadmissible evidence but may even focus more attention on the evidence they were instructed to ignore.").

committed substantive crimes, with or without the burner phone. In that case, it seems clear that someone who buys a burner phone is protesting the police's surveillance of phones in general and not the criminalization of any acts, since the protestor is, by Professor Joh's definition, content with refraining from committing crimes.[171]

So too here. If the form of my proposed ABA rule is "No negotiation [satisfying certain conditions, such as dollar floors] can take place between two attorneys unless there's a camera in the room" such that turning a camera on is Step 1 to the negotiation, then a protest of that rule can only occur at that moment—i.e., the attorney would have to refuse the camera's placement.

That would be like asking an arbitrator to leave the room of an arbitration. An arbitrator's presence is *mandatory*; without her, it would no longer be an arbitration. I trust that even the most stubborn attorney would agree that it would be profoundly bizarre to ask of an arbitrator "what are you doing here, at this arbitration?"

But then the stubborn attorney might retort "an arbitrator's presence at an arbitration is distinguishable from a camera's presence in a negotiation—there's just something creepy about a camera watching me." This retort tries to attach an Orwellian meaning to the camera, which in fairness is natural and understandable. After all, what is surveillance if not Orwellian?

But return once more to Professor Joh's privacy protestors who buy burner phones or encrypt online communications because they feel indignation toward the technological monitoring of their innocent activities. If they are to be internally consistent, then such protestors should take even greater offense at a live-person law enforcement official who purposefully occupies the same room they are in, standing mere feet away. And they probably would. But notice how the corresponding analog to that live-person law enforcement official would be a live-person arbitrator, mediator, or judge. Put simply, if surveillance is the problem, then that problem should be *more* acute when a live person watches you than when a camera does.

And yet, we intuit that the attorney would not perceive the arbitrator who presides over his arbitration as "surveilling him," even though the potential and worry for surveillance should be at least equally present, if not more salient, in a room with an arbitrator than one with just a camera. Why? I posit that it is because video cameras, at least initially, carry a distinctively Orwellian *social meaning*, but everyone seems to have accepted that an arbitrator's presence at an arbitration is "normal," "ordinary," or otherwise "just part of the rules of the game."

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[171] Joh, *Privacy Protests*, *supra* note 164, at 1017 ("Those engaged in privacy protests, however, are not merely innocents who are caught up inadvertently....").

2. *Social Meaning & the "Orwell Effect"*

Professor Lessig describes the "Orwell effect" thus "when people see that the government or some relatively powerful group is attempting to manipulate social meaning, they react strongly to resist any such manipulation."[172] That the ABA would qualify as one such "relatively powerful group" seems clear enough, but what would be the *social meaning* of placing a camera—or requesting that one be placed—in the room before negotiations can commence? For Professor Lessig, a message takes on different social meanings depending on who the messenger is; nowhere does the messenger's identity make for a starker contrast than when one messenger is "the government" and another is not.[173]

So, consider what it would mean for a private negotiator to ask his counterpart across the negotiating table "you don't mind if we record this on film, do you?" One might imagine the following reflexive response "Why would you need to do that? You don't trust me, is that what this is about?" Like Professor Joh's privacy protestors or officers subject to Judge Schendlin's decree, it's not hard to see how a negotiator who generally sees herself as an honest person might legitimately infer insult from that request.

But from Professor Lessig's Orwell effect it need not necessarily follow that when "the government" (i.e., the ABA, a "voluntary professional organization")[174] formalizes the same request via a new Model Rule, a negotiator bound by her licensing jurisdiction's adoption of the new Rule would be more likely to infer an even greater insult from the new Rule than from an individual counterparty's request.

Harken back for a moment to the last time you were surrounded by cameras—at an airport. Chances are, you scarcely noticed any then, or remembered any since, until just now. If so, then that would indicate that in an airport, surveillance cameras have *lost* their Orwellian social meaning: if you did *loathe* them as intrusive, you probably wouldn't forget it. Indeed, airports' heightened security has long been engrained into airports' backdrop—and into the public consciousness. However, you might have felt when the rules first changed, today you can probably appreciate that they help ensure public safety. They were installed not because the government doesn't trust *you*, or the person seated next to you in coach, or anyone in particular.

Consider another security measure ubiquitous at airports: agents' searches

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[172] Lessig, *supra* note 159, at 1017.

[173] *See id.* at 1016 ("Speech by politicians is clearly less effective than speech by nonpoliticians in persuading or convincing someone of some truth.").

[174] American Bar Association, *About the ABA*, available at http://www.americanbar.org/about_the_aba.html (last visited Feb. 14, 2017).

of your person and belongings. By now, most people "do not view it as a violation of social norms for a government official to search their bags."[175] Consequently, "in airports, we submit to systematic examinations from security personnel that we would not necessarily tolerate from private acquaintances or even friends."[176] Try to imagine how upset you'd be if you learned that "the person in a uniform rummaging through [y]our suitcase was not an official at all, but an acquaintance in disguise."[177] But when it's a *bona fide* government official, someone you hardly know, and certainly know less well than you do your friends? However objectionable you might've found it in the past,[178] by now it's become so routine that you simply tolerate it as "the price of admission."

As in airports, the camera rule, when first implemented, can start out as the price of admission to a negotiation. As in airports, you find it easier to stomach when it's the government who asks you to allow the camera than when it's a friend. And as in airports, the camera will one day fall into the backdrop of negotiations as its unseemliness fades.

Another ABA Model Rule followed just that evolutionary cycle: Rule 4.1. Rule 4.1 has been around for a while now (since 1983, in fact).[179] When a law student or a newly minted lawyer learns of his obligations under it, he seems unlikely to presume that the only reason the ABA would adopt a rule like Rule 4.1 is that the ABA does not trust him. A rulemaking body that enacts a new rule to mandate or encourage honesty need not imply that any particular attorney is dishonest.

Moreover, as explained above, an attorney who would oppose a new ABA camera rule should air his true grievances against Rule 4.1 itself, since *that rule* places far more substantive restrictions on his freedom than would my procedural innovation mandating cameras. It follows that if an attorney accepts Rule 4.1 in part because he does not perceive it as limiting his liberty, then he should not see a new ABA rule mandating videotaping as such, either. Nor should he have any reason to abhor it simply because it came from the ABA.

In fact, the hypothetical exchange between private negotiators above would suggest that the ABA has a comparative advantage over a single private negotiator in influencing negotiators who might initially be skeptical to accept

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[175] Marc Jonathan Blitz, *Video Surveillance and the Constitution of Public Space: Fitting the Fourth Amendment to a World that Tracks Image and Identity*, 82 TEX. L. REV. 1349, 1417 (2004).

[176] *Id.*

[177] *Id.*

[178] *Id.* at 1417 n. 336.

[179] *See* Bordone, *supra* note 10, at 20.

the video camera's role and place in the room. The ABA is a distant, impersonal, and general body charged with overseeing and improving the legal profession.[180] Where a private negotiator can merely ask that her counterpart agree to videotaping, thereby risking that her counterpart would perceive the request as targeting him as someone untrustworthy, the ABA can broadly mandate it for all attorneys, which would absorb or eliminate any connotations of negative social meaning.

Here I borrow Professor Bordone's stipulation that such a rule be mandatory.[181] Not only would mandatory coverage allow negotiators to look to public sanctions for enforcement instead of the rare private suit against the rarer negotiating counterpart who would uncritically accept a request,[182] it would obviate the very need for a private negotiator to make that request at all.

Under a mandatory regime, a negotiator who walks into the conference room and notices her counterpart turn on or adjust the video recorder would simply see it as within the "rules of the game." By becoming "the new normal," a video recorder's presence in the room would no longer connote the same social meaning of suspicion and mistrust as it does in the status quo wherein one negotiator must initiate the request.

Therefore, my proposed rule is more akin to one of Professor Lessig's more successful examples of a regulation that solved a collection action problem by changing the social meaning that the regulated would impute to the regulation's desired behavior. [183] He chronicles that for much of professional hockey's history, "most hockey players did not wear helmets."[184] Why might this be, given a helmet's obvious benefits? Because of the not-so-obvious but costly social meaning—the stigma—associated with putting a helmet on, which was seen as inconsistent with hockey players' macho self-image.[185] Some may deem hockey players' prioritizing their macho self-image over their skulls' intactness to be pure folly, but that does not change the felt reality that a hockey player who would volunteer to don a helmet in a community and era wherein no one else did would uniquely suffer significant stigmatic harms.[186]

So, the National Hockey League (NHL—in some ways the ABA of

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[180] American Bar Association, *supra* note 174.

[181] Bordone, *supra* note 10, at 31.

[182] *See id.* at 30 (noting that individually adopting ethical codes by private contract instead of by public mandate precariously depends on private enforcement via litigation).

[183] Lessig, *supra* note 159, at 966.

[184] *Id.* at 967.

[185] *See id.*

[186] *Id.*

hockey players) "made it a rule that players wear helmets."[187] Thereafter, everyone started wearing a helmet because putting one on no longer telegraphed the same social meaning, nor sacrificed the same values, as it once did. Thereafter, a player who's asked "Why do you wear a helmet? Don't you know it makes you look un-macho?" can retain his image as a macho player by simply answering that he wears one because the NHL's rules of the game require him to wear one as a precondition to his participation in official NHL games. Helmet-wearing thus became "the new normal"; whether you're about to attend your first live game or reminiscing about the last time your favorite NHL team won the Stanley Cup, you'd see a helmet-wearing skater and think nothing of it, least of all that it once meant something else entirely.

There, hockey faced a collective action problem: no one particular player wanted to be the brave pioneer to first don a helmet, because he alone would bear the brunt of stigmatic social meaning. The NHL's rule, in making *everyone* wear one, also made it easier for all players to accept gladly instead of begrudgingly. Indeed, barely seven years after the NHL helmet rule took effect, one player remarked that he was "glad [to] have an *excuse* to wear one."[188]

Likewise, the ABA, by mandating from afar this small addition to its rules of the game as a condition to any negotiation (i.e., a video camera must be on before any negotiation begins, just as all NHL players must have helmets on before an NHL game can start), can solve the prisoners' dilemma wherein no one negotiator wants to be the only one to initiate an insulting request or to take a leap of faith. Once enacted, it will usher in negotiators' transition into a new normal.

However, this transition will not take place overnight. Doubtless, a negotiator who hasn't caught up with the latest continuing legal education (CLE) or ABA updates, upon walking into a room, would surely notice a blinking camera as an anomaly and demand that his counterpart explain, if not remove it entirely. But the new ABA rule would supply a neutral authority to appeal to: she might say "I was just as surprised when I learned about it as you are now, and I didn't like it any more than you might, but it's a new ABA requirement—see? It says so right here." The ABA can pitch the new rule not as an omnipresent reminder that "somebody's watching" but as a facilitator, or even as a prophylactic measure in place to protect well-meaning attorneys, which each attorney thinks himself to be, from exploitation by bad apples.

Eventually, a camera in a negotiation room will surprise a negotiator no

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[187] *Id.* at 968 (citing *N.H.L. Rules New Players Now Must Wear Helmets*, N.Y. TIMES, Aug. 7, 1979, at C14).

[188] *Id.* (citing Craig Neff and Robert Sullivan, *A Prescription for Safety*, SPORTS ILLUSTRATED, Jan. 13, 1986, at 7) (emphasis added).

more than an arbitrator would surprise a party to the arbitration. Once the novelty of my new ABA rule wears off, it would simply be seen and accepted as part of "the rules of the game." At that point, the camera would not bear an Orwellian social meaning we might now instinctively associate with "camera surveillance," any more than a hockey helmet implies its wearer's "unmachoness," an implication that the NHL rule severed almost immediately upon effectiveness, and certainly within seven years of its adoption.[189]

Hence, videotaping need not carry a Big Brother-esque social meaning. Nor need the ABA pitch it as, or attorneys receive it as, a limitation. Quite the contrary, we should follow Professor Bordone's own paradigm shift: given negotiation's emphasis on integrative problem solving, its ethical codes—its 'rules of the game'—are better conceptualized as "facilitators of particular kinds of behaviors, attitudes, and conditions that ennoble" cooperation than as constraints.[190] Again, airport cameras are there to protect you and countless others, not to keep an eye on *you*. Hockey helmets are worn to shield you, not to slow you down, obscure your vision, or belittle anyone's machoness.

Thus conceived, a negotiator who resists the installation of a video camera before each negotiation is not deemed "wrong" or somehow morally bad.[191] Rather, he is depriving himself of a prime advantage the rule would afford him: "a professional environment in which practitioners are able to most competently, efficiently, and successfully produce the best possible result."[192] By excluding himself from just this environment, the negotiating attorney would be subjugating his universally recited duty to zealously advocate for his client's desired outcome to his own personal, but likely unwarranted and inarticulable feeling of discomfort. And even this discomfort, which I acknowledge as real just as pre-helmet NHL players' fear of social stigma was real, will wane.

B. *Practical Concerns*

Having addressed theoretical objections suggesting that my proposal may spark resistance and thus backfire, I now move onto practical concerns that are likely to linger in the back of negotiators' minds, even those who broadly accept the ABA's goals as worthwhile.

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[189] *See id.* at 967–68 (chronicling the NHL rule's introduction in 1979 and its widespread acceptance by 1986, if not immediately).

[190] Bordone, *supra* note 10, at 9.

[191] *See id.*

[192] *Id.* at 9–10.

1. *Inconvenience*

First, it seems elementary that requiring that a video camera be in the room naturally presupposes a *room* hospitable to recording devices. Thus, a rule requiring *all* negotiations to occur on camera might threaten to eliminate negotiation in more informal settings (e.g., while seated next to one another on a train or a plane, in a restaurant, or over the phone). I must acknowledge that this would represent some loss of convenience, which is one of negotiation's main advantages over stiffer courtroom settings.[193] Insofar as a particular eleventh hour negotiation *must* occur between two attorneys seated next to each other aboard an airplane in flight, they can reach a preliminary but nonbinding agreement there and memorialize it later.

I would also caveat my proposal by establishing a dollar floor below which no video recording is necessary. At this stage, I need not produce an exact baseline to serve as the floor. The important aspect to appreciate is that this caveat would exempt *de minimis* interactions.

Conversely, the rule would only apply to transactions above a certain floor, reflecting the principle that "if it's worth lying for, it's worth having it on camera." This use of minimum thresholds to exclude (or spare, depending on one's perspective) wide swaths of claims from special or heightened rules finds analogs in many areas of the law. For example, federal courts' diversity jurisdiction may be invoked only if the amount-in-controversy exceeds $75,000.[194] Similarly, financial regulation is often tiered to correspond to regulated entities' size as measured in dollar amounts: the landmark Dodd-Frank Act of 2010 exempts from otherwise comprehensive regulatory regimes financial institutions whose total assets fall below triggering floors.[195] An appropriate demarcation line akin to an "amount-in-controversy" can serve not only this proposal to videotape but also future ideas for refining the negotiation process.

2. *What About Phone & Email Negotiations?*

In the past, an amount-in-controversy threshold might have sufficed to leave untouched negotiations conducted over the phone and via email. Today,

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[193] Norton, *supra* note 14, at 506.

[194] 28 U.S.C. § 1332 (2011).

[195] Dodd-Frank Act, Pub. L. No. 111-203, §115, 124 Stat. 1376, 1403 (2010) (subjecting bank holding companies whose assets exceed $50 billion to special Federal Reserve Regulations); *see also* Jonathan R. Macey & James P. Holdcroft, Jr., *Failure Is an Option: An Ersatz-Antitrust Approach to Financial Regulation*, 120 YALE L.J. 1368, 1403 (2011) (critiquing whether the DFA set the threshold at the appropriate dollar amount).

however, that may no longer be true, as "[f]ew negotiations are conducted entirely in person."[196] Even among negotiations that begin as predominantly in-person, "[m]ost include portions carried out through telephone and email."[197] This trend is unlikely to abate anytime soon, as those nimbler modes of communication add flexibility and efficiency to negotiations.[198] Users of them might well wonder: would my rule ban telephonic and email negotiations, as they cannot be videotaped?

Since phone calls and emails are not susceptible to a real-time monitor's observation, it is true that social facilitation cannot influence negotiators to behave more cooperatively *ex ante*. Regarding email, its written form provides the sort of contemporaneous record that Judge Scheindlin hoped video cameras would substitute for.[199] Emails can also serve as their own evidence, which lightens some of the difficulties of proof that currently plague Rule 4.1. Thus, emails can strengthen *ex post* enforcement against deceptive email negotiations, playing the same role videos play for in-person negotiations.

Phone negotiations are trickier, not least of all because they might be subject to laws that require all parties to consent before any recording can occur. Presumably, if a negotiating counterparty is willing to sit down with you in person while the camera's rolling, that's a pretty good indicator of consent. Not so with phone calls: if the person you're calling is a few time zones away, you'd have to affirmatively ask for permission before you begin recording.

My proposal seeks to preserve the flexibility inherent in phone calls and emails. But leaving phone and email completely untouched would only invite deceptive negotiators to engage in *regulatory arbitrage*, whereby they would purposefully avoid in-person negotiations in order to avoid the video requirement altogether. To dissuade this type of gamesmanship, telephonic negotiators should insist that material facts discussed over the phone be memorialized in the form of representations, warranties, and covenants. Professor Mnookin himself recommends that negotiators use these contractual elements to smoke out deception.[200] Quite neatly, you can request that your counterparty incorporate these provisions into an email contract. If ease of communication (or fear of planes) were the true motivation behind his avoidance of in-person negotiations, then he should have no reason to object to forming an email contract with protective devices built in.

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[196] Charles B. Craver, *How to Conduct Effective Telephone and E-Mail Negotiations*, 17 CARDOZO J. CONFLICT RESOL. 1, 1 (2015).

[197] *Id.*

[198] *See id.* at 6.

[199] *See Floyd*, 959 F. Supp. 2d at 685.

[200] MNOOKIN ET AL., *supra* note 36, at 239.

If, however, 1) your counterparty refuses to meet in-person at all, even for signing and closing; 2) he refuses to accede to contractual provisions guaranteeing the truth of what he said over the phone; and 3) the stakes were high enough, then you can simply take your business elsewhere. After all, you'd be prudent to refuse to commit to a lease or a large purchase over, say, Craigslist without (at least) meeting your counterparty in-person and closely inspecting his offering. That same prudence also applies here—again, if it's worth lying about, it's certainly worth negotiating over in person and on camera.

3. *Confidentiality*

Outside of their philosophical objections, attorneys feeling a camera's gaze may also wonder: who else besides my negotiating partner, who's also on this recording, will be able to access it? But my proposal need not introduce more uncertainty as to what effects can fall into whose hands, since there are already mechanisms in place to safeguard the videotapes from unauthorized viewings.

For one thing, precisely because one's counterparty is also on the same videotape, he will be seen as having discussed information about his own client on camera. MRPC Rule 1.6 commands him to maintain his client's confidentiality and to take reasonable steps to protect materials from dissemination that may compromise that confidentiality.[201] Thus, well-settled principles of attorney-client confidentiality already give him a self-interested reason—and impose upon him a duty—to protect videotapes not only for his counterpart's sake but for his own.

Attorneys are fully aware of their duty to maintain their clients' confidentiality, but they may further ask: "Where am I to store the tapes? How much would it cost?" Indeed, cost concerns may weigh particularly heavily on attorneys who do not enjoy the financial resources of a large, for-profit organization. But it turns out that storage costs may be quite minimal: Google Drive, a leading electronic storage provider, offers every user 15 gigabytes (GB) of space, free of charge.[202] From there, users can purchase an extra *terabyte* (1 TB, or 1,000 GBs) for $9.99/month.[203] To give you a sense of perspective: Apple estimated that its 5th Generation iPod, released in 2005,

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[201] MODEL RULES OF PROF'L . CONDUCT, r. 1.6 (AM. BAR. ASS'N 2016).

[202] *Google Drive Storage Plans & Pricing*, Google, https://support.google.com/drive/answer/2375123?hl=en&ref_topic=14940 (last visited May 4, 2016). Disclosure: The author has no interest, financial or otherwise, in Google, Inc. or any other storage providers.

[203] *Id.*

can hold 75 hours of video in its 30 GBs.[204] Even if we were to assume that video compression technology has not advanced in the decade since, Google Drive's free 15 GBs can store more than 35 hours of video, and its $9.99 1 TB plan can hold 2,500 hours, or 104 *days* of video. Storage costs are likely to constitute no more than a drop in the bucket of a typical attorney's budget.

To the extent that the existing Rule 1.6 protections do not completely allay attorneys' reservations, the ABA can make videos recorded pursuant to my proposed ABA rule subject to an ABA-drafted, standardized, but customizable nondisclosure agreement (NDA) that prohibits either negotiator from publicizing the video except as necessary to establish that the other negotiator had been deceptive or exploitative. Even then, the videotape can be introduced as evidence only if a neutral judge (or ethics committee) reviews the video *in camera* (pun intended) to screen out frivolous accusations offered as pretextual conduits to publicize another negotiator's tactics. This solution, too, has a basis in preexisting MRPC: Rule 8.3 already obligates attorneys to report to appropriate authorities instances of another attorney's ethical violations, such as an insistence to conduct a negotiation with the camera off.[205]

Now, in one sense, it is true that people often request that a camera currently on be turned off so that they may speak "candidly." One can imagine a journalist's confidential source making just this request. But two aspects differentiate a private negotiation from a journalist's interview of a confidential source. First, a confidential source requests anonymity, or asks to speak "off the record," often because he lacks authorization to make public statements concerning a sensitive subject.[206] Think of all the government officials who speak on the condition of anonymity in leading national newspapers. This is not the case with negotiators, for they invariably arrive at the negotiating table having already received their clients' authorizations.[207]

Second, the journalist's purpose is to write a news story incorporating the confidential source's information that could be read by the entire public. A private negotiation, by contrast, is just that—private. Rule 1.6 duties and a new standardized NDA only serve to emphasize negotiations' private nature. No negotiation not intended to generate a buzz in, say, the *Wall Street Journal*, should or would splatter across tomorrow's front page.

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[204] Kim Christensen & Terril Y. Jones, *Launch of Video IPod Shines Light on Jobs, Disney Drama*, L.A. TIMES, Oct. 13, 2005.

[205] MODEL RULES OF PROF'L . CONDUCT, r. 8.3 (AM. BAR. ASS'N 2016).

[206] *See* Margaret Sullivan, Op-Ed, *The Disconnect on Anonymous Sources*, N.Y. TIMES, Oct. 13, 2013, at SR 12
(questioning media's granting of anonymity as overbroad).

[207] *See* MNOOKIN ET AL., *supra* note 36, at 319.

4. *"Getting the ABA to Say Yes"*

The last practical obstacle, as is often the case with any newly proposed ABA rule, is to convince the ABA to actually adopt it. Presenting a wise proposal is only the first step. As noted in the introduction, the ABA has modified Rule 4.1 only slightly in its three decades of existence. Its Ethics 2000 Commission failed to enact broad reform. And the ABA recently rejected The National Conference of Commissioners on Uniform State Laws' push for a new Uniform Collaborative Law Act (UCLA) in 2011 for reasons that baffled some commentators.[208]

But unlike the UCLA, I do not urge the ABA to create a large carve-out that would allow either side to disqualify the other side's lawyer at any time for any reason—a flaw the ABA cited in its rejection of the UCLA, perhaps misunderstanding that that same feature is responsible for much of collaborative law's success.[209] Instead, I merely propose an incremental addition to negotiations that could go a long way toward solving intransigent deception in negotiations. The ABA shares my interest in encouraging attorneys to cooperate more with each other: The Ethics 2000 Commission's recommended changes to Rule 4.1, though not ultimately as sweeping as some would've liked, "clearly portray[ed] the Commission's desire for more truthful lawyers."[210]

Even Professor James White, whose views of his time won the day against a more stringent draft of Rule 4.1, recognizes that "to have [a negotiation rule] so widely violated [would] be a continuing hypocrisy."[211] Well, Professors Hinshaw and Alberts have demonstrated that Rule 4.1, diluted as it is, is still violated widely enough to call into question the Rule's utility.[212] If for no other reason, the ABA should at least consider a slight, virtually riskless tinkering of its rules in order to improve clients' own opinions of the attorneys they seek, whom the public thinks "less truthful than [are] most people."[213]

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[208] *See* Stephen Gillers, *How to Make Rules for Lawyers: The Professional Responsibility of the Legal Profession*, 40 PEPP. L. REV. 365, 391 (2013) ("It would be perfectly fitting to reject the resolution if the [ABA] believed that the [UCLA] was inappropriate, perhaps because of drafting problems. But the debate...voiced three dubious objections to the very idea of collaborative law....").

[209] *Id.* at 393.

[210] Martin & Dees, *supra* note 143, at 778.

[211] Hinshaw & Alberts, *supra* note 4, at 162.

[212] *Id.*

[213] Martin & Dees, *supra* note 143, at 779 (citing Edward D. Re, *The Causes of Popular Dissatisfaction within the Legal Profession*, 68 ST. JOHN'S L. REV. 85, 87 (1994)).

VI. CONCLUSION

Under my proposal, negotiators would and could do everything they would normally do—just on film.[214] My proposal can be part of Professor Bordone's MRPCN, or it can be tacked onto the existing Rule 4.1 that governs negotiations within the extant MRPC. Its force derives from monitoring's social facilitation of desirable behavior, a nearly ubiquitous phenomenon which makes it portable to other domains of the law currently grappling with their own ethical dilemmas. This portability may prove especially helpful in the modern legal profession, one increasingly characterized by blurrier boundaries delineating where conduct befitting the practice of law crosses over into another realm altogether.[215]

Indeed, implementing this one simple rule universally may even obviate the need to have separate bodies of ethics for each lawyer-like activity (e.g., a separate MRPCN), a segmentation that might introduce new risks associated with line-drawing difficulties[216] and ethical arbitrage between discrete segments as one sees fit.[217]

Whether to subdivide the MRPC as Professor Bordone suggests is a topic grander than this paper's modest aims.[218] What is clear is that the MRPC's Rule 4.1 has not sufficed to rid negotiation of deception. My paper recommends that the ABA require that all negotiations above a certain dollar threshold occur only on camera, whose recordings will be protected by attorney-client confidentiality and robust NDAs. If the ABA frames this rule not as a constraint but as a facilitator (much as an airport's cameras are there to protect you), the ABA can delink a video recorder from the Orwellian social meaning ("I don't trust you; therefore, I must watch you") some skeptics may otherwise assume. Freed from that social meaning, it should gradually come to enjoy high compliance.

Once sanctioned, a video recorder would become embedded within "the

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[214] Perhaps negotiators inclined toward using profanity during negotiations would change this habit if on film, but that's a risk worth taking.

[215] *See* Dana A. Remus, *Out of Practice: The Twenty-First-Century Legal Profession*, 63 DUKE L.J. 1243, 1246

(2014) ("[As] [l]aw and business grew together,... a murky and ambiguous boundary zone replaced the once-crisp demarcation between the two.").

[216] *See* Bordone, *supra* note 10, at 38 (acknowledging the challenge of ascertaining "when negotiation ends and litigation begins").

[217] Remus, *supra* note 215, at 1264.

[218] *See id.* at 1263 (faulting both the traditional litigation-intensive model and the segmented model for focusing "narrowly and exclusively on the practice of law, and fail[ing] to recognize and account for other, increasingly significant forms of lawyers' work.").

rules of the game." As negotiators become more accustomed to its presence, a videotaped negotiation will constitute "the new normal." Even so, the negotiating process may remain mostly a "private, self-policed market process," as it has been for almost the entirety of its existence.[219] And there may still be "no practical way to police ethical decisions from outside the process."[220] But if my introduction of the video recorder succeeds in both socially facilitating truthful behavior *ex ante* and easing *ex post* enforcement, *it will become a part of the negotiating process itself.* At that point, this one additional procedural rule can regulate deception in negotiation more effectively than can noble but impracticable substantive restrictions.

Thus, I submit videotaping negotiations as one practical way to police ethical decisions from *inside* the process.

[219] Norton, *supra* note 14, at 532.
[220] *Id.*